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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DERRICK L. FOSTER,

Defendant and Appellant.

B203500

(Los Angeles County
Super. Ct. No. NA068735)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Tomson T. Ong, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Theresa A. Patterson and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Derrick Foster was convicted, following a jury trial, of one count of first degree murder in violation of Penal Code¹ section 187, subdivision (a) and one count of assault with a deadly weapon in violation of section 245, subdivision (a)(1). The jury found true the allegations that appellant personally used a knife during the commission of the murder within the meaning of section 12022, subdivision (b)(1) and personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). The trial court sentenced appellant to a term of five years plus a 25-year-to-life term in state prison.

Appellant appeals from the judgment of conviction, contending that there is insufficient evidence to support his murder conviction, and further contending that the trial court erred in admitting evidence of knives and the prosecutor committed misconduct. We affirm the judgment of conviction.

Facts

On December 24, 2005, at about 10:30 p.m., Long Beach Bus operator Thomas Collins stopped bus number 9619 near the intersection of 19th Street and Magnolia to pick up appellant. Appellant paid his fare and went to the back of the bus and sat down. Jessica Walton got on the bus and sat near the front wheelchair area. After she sat down, appellant moved forward. He put his bag on the seat across from Walton and sat directly behind her. Michael White got on the bus and sat down directly behind the bus driver.

Appellant pulled the cord to indicate that he wanted to get off the bus. Collins heard the signal and pulled over at the next stop. Appellant said, "No. Not this stop. The next one. Near the hotel." Collins pulled away from the stop.

Appellant picked up his bag and put it on his back. He then sat down, and pushed the signal cord again. Appellant stood back up, put his hands behind his back and approached White. In each hand, appellant was carrying a knife. Appellant said

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All further statutory references are to the Penal Code unless otherwise indicated.

"Fucking with mine" or "Fucking with minds." He also said, "I'm going to get you." Appellant then began stabbing White.

Walton saw something pointy in appellant's hand and also saw blood coming from White. She then realized that appellant had a knife in each hand and was stabbing White with both hands. Walton said, "He is stabbing the man. Stabbing the man. Stop the bus. Let me off."

Collins pushed a button to activate a date and time mark on the bus surveillance cameras. He also pushed a button which sent out a signal that police were needed.

Appellant turned to Walton and punched her. Walton cursed at appellant. Appellant swung his hand and hit Walton in the shoulder. She felt that her shoulder "popped." She yelled at appellant. Appellant walked back to White and resumed stabbing him. Walton went to the back of the bus. Walton later realized that appellant had stabbed her.

Walton did not see White with any weapons. She did not hear White say anything to appellant or do anything threatening.

Collins stopped the bus and waited for assistance. Appellant got off the bus. White got up, walked toward the door and collapsed. In about five minutes, police arrived.

White died. Walton was taken to the hospital, where she had surgery. A rod and screws were placed in her arm to mend the bone. At the time of trial, she was still unable to use her arm. She was scheduled for a second surgery after trial.

Long Beach Police Detectives David Rios and William Matsubara investigated the stabbing. Detective Rios retrieved the videotape from the bus with the assistance of a Long Beach Transit vehicle safety officer. The video showed the bus from several different angles. The video showed events from appellant's arrival on the bus through the stabbings to appellant's flight from the bus. It was played for the jury.

Forensic Specialists Carmen Moncure and Sara Barnard viewed the video and determined where the attacker had touched the bus. They took finger and palm prints from those areas. These prints were eventually matched with appellant's prints.

Appellant was contacted on January 3, 2006, by Los Angeles Police Officer Brian McMahon, who was on patrol when he recognized appellant from still photographs from the bus surveillance videos. After verifying appellant's name and address, Officer McMahon allowed him to go on his way. Appellant was placed under surveillance, however, and was arrested on January 5.

Detective Rios spoke with appellant's mother, Gladys Dillon. She told him that appellant was dressed all in black when he left the house on Christmas Eve and the family joked that he looked like he was going to commit a crime. Appellant told his family that he was going to get a soda. At about midnight, appellant called and asked for a ride home. Dillon's husband picked appellant up. About 6:00 a.m., Dillon saw appellant bringing clothes from the washroom and carrying more out to the washroom. Dillon noticed that he was washing all his clothes. Dillon also told police that appellant had purchased a pair of black tennis shoes about a month before Christmas, but she no longer saw them after Christmas. She noticed that appellant bought a new pair of shoes a few days after Christmas. She also told police that she had noticed that a lot of her kitchen knives were missing from her knife drawer. A tape of the conversation was played for the jury.

Dillon also told Detective Rios that she had received a call from Sharon Steele telling her that appellant had given Steele's son Dante Wince a present which Wince had thrown away. Appellant and Wince had been friends since childhood, but had not spoken with each other for a couple of years and had never exchanged Christmas presents. Wince acknowledged that appellant came to his house on Christmas Day and gave him a wrapped present. Wince did not know why appellant was giving him a gift. After appellant left, Wince placed the present in a white garbage bag and threw it away unopened.

Steele showed Detectives Rios and Matsubara the dumpster where Wince had disposed of the present. Detective Matsubara searched the dumpster and found a white plastic bag containing a package partially wrapped in silver wrapping paper. The package contained two folding knives with curved blades. Dillon identified the wrapping

paper as that used by appellant to wrap a package on Christmas Day. She also showed Detective Rios some of the wrapping paper.

The folding knives were analyzed, but did not contain any traces of blood. The medical examiner testified that White's wounds were consistent with having been inflicted by the folding knives, but also were consistent with having been inflicted by straight-bladed kitchen knives and other weapons.

The medical examiner testified that White suffered eight stab wounds, one of which was definitely fatal, and one of which was potentially fatal. The definitely fatal wound was a neck wound which penetrated the carotid artery and jugular vein.

Appellant's defense was essentially that he had a mental disorder of some sort, had taken prescription medication that day, and was hallucinating either from the medication itself or lack of sufficient medication. This defense was based on inferences from testimony by Dillon and defendant's "strange" movements while sitting on the bus.

Discussion

1. Sufficiency of the evidence – murder

Appellant contends that there is insufficient evidence that he premeditated and deliberated White's murder. We see sufficient evidence.

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) First degree murder is a murder committed with premeditation and deliberation. (§§ 187, 189.)

"'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." [Citations.] [Citation.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

"In determining the sufficiency of the evidence proving premeditation and deliberation, we review the entire record in the light most favorable to the People to

determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] Evidence concerning planning, motive, and manner of killing are pertinent to this determination, but these factors are not exclusive nor are they invariably determinative. [Citation.]" (*People v. Marks* (2003) 31 Cal.4th 197, 230.) The question is "whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." (*People v. Sanchez* (1995) 12 Cal.4th 1, 32-33.)

Here there is evidence of general planning to commit a crime. Appellant was wearing all black clothing, which was apparently unusual for him and carrying two knives when he boarded the bus. These actions support an inference of planning. (See *People v. Palmore* (2000) 79 Cal.App.4th 1290, 1298 [defendant's dark clothing, scarf and gloves showed that he formed felonious intent before going into restaurant and did not suddenly form intent once inside and eating]; *People v. Morris* (1988) 46 Cal.3d 1, 23 [possession of a deadly weapon in advance of a killing is factor showing planning activity].)

There is also evidence of a specific plan to attack White. Before attacking White, appellant asked the bus driver to stop at the next stop. Appellant then moved forward, picked up his bag, put it on his back, and sat down again behind Walton. These movements create an inference that appellant was planning an escape. There are no knives visible in his hand during these movements. When appellant stood up again, the knives were in his hands. Thus, he had his knives out and in his hands before approaching White. He concealed the knives behind his back, however. This preparedness and concealment creates an inference that appellant planned the attack. Although these events occurred in a very short time period, they show calculation and forethought.

The manner of killing also suggests premeditation and deliberation. When Walton told the bus driver that appellant was stabbing White, and asked the driver to stop the bus, appellant broke off his attack on White to attack Walton. After he punched and stabbed

Walton, he returned to White and stabbed him again more than once. These actions suggest a pre-planned killing of White, not simply a rash explosion of violence at the passenger nearest the exit.

There is also some slight evidence of motive. Before stabbing White, appellant said "I am going to get you" and "Fucking with mine" or "Fucking with minds." This suggests that appellant believed that White had somehow "fucked" with him. There was no evidence of any pre-existing relationship between appellant and White, however, and White said nothing to appellant or anyone before the stabbing. Thus, this is weak evidence of a motive.

Appellant's actions on the bus occurred in a fairly short period, but are consistent with reflection and weighing of considerations rather than mere unconsidered or rash impulse. Thus, there is sufficient evidence to support the jury's finding.

2. Knife evidence

Appellant contends that the trial court abused its discretion in admitting evidence that he gave two knives to Wince the day after the stabbing. We do not agree.

"When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon. [Citations.] When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons. [Citations.]" (*People v. Cox* (2003) 30 Cal.4th 916, 955-956.)

Here, appellant contends, in effect that the prosecution relied on specific weapons, that is the knives shown in the video. Appellant characterizes the knives in the video as long kitchen knives with straight blades. The knives appellant gave to Wince were

folding knives with curved blades. Appellant concludes that the curved knives could not have been used in White's murder.

We have reviewed the video from the bus and the still photographs. We agree that the knife in appellant's right hand is markedly different from the knives appellant gave to Wince. We find the image of the knife in appellant's left hand to be fuzzy and lacking in detail. We cannot rule out that that knife is one of the curved blade knives. In the medical examiner's opinion, the dumpster knives could have caused the wounds on White. Thus, one of the knives could have been used in the murder. Thus, the knives were properly admitted under *People v. Cox, supra*.

Further, even if the curved blade knives were not the murder weapons, appellant's attempt to dispose of those knives does have some tendency to show consciousness of guilt. It is possible to infer that appellant gave the knives away shortly after the murder because he believed that his possession of any knives would cause the police to be more likely to view him as a murderer.

Even assuming for the sake of argument that the trial court erred in admitting the curved blade knives, we see no reasonable probability that appellant would have received a more favorable outcome in the absence of the curved knives evidence. (Evid. Code, § 353, subd. (b); *People v. Bradford* (1997) 15 Cal.4th 1229, 1323-1324; *People v. Watson* (1956) 46 Cal.2d 818, 836 [all setting forth standard of review].) The evidence that appellant was the killer was overwhelming. Not only was appellant caught on videotape committing the crimes, but his palm prints were found on the bus in areas that the videotape showed the killer touching. Walton identified appellant as the killer. The evidence of appellant's mental state was not as overwhelming. However, the evidence was very strong that appellant brought knives used in the killing with him on the bus and disposed of other incriminating evidence later, by washing his clothes and getting rid of his new shoes. Thus, evidence that he had other knives and acted to get rid of them after the killing added nothing new to the consideration of appellant's mental state, and could not have influenced the verdict.

3. Prosecutor's questioning

Appellant contends that the prosecutor erred in asking appellant's mother for her opinion on appellant's guilt. We do not agree.

The prosecutor asked appellant's mother: "You didn't want to see [appellant] charged with a crime or convicted of a crime?" She replied: "That depends whether he is guilty of a crime or not." The prosecutor then asked: "Well, isn't it true, ma'am, that on January 12, you told the detective you believe your son had committed this murder?" Before appellant's mother could answer, appellant's counsel interjected: "Objection: irrelevant. Your Honor, move to strike." The court responded: "Well, the question is not evidence. Objection is not relevance and that actually is sustained, but that invades the purview of the jury. The jury decides whether or not the defendant did or did not commit the murder."

Appellant is correct that appellant's mother could not express an opinion on his guilt. (*People v. Coffman* (2004) 34 Cal.4th 1, 77 ["opinions on guilt or innocence are inadmissible"].) Here, no opinion was ever elicited. Appellant's mother did not answer the question.

The trial court instructed the jury before trial began that an attorney's questions are not evidence and that the jury should not assume that something was true just because one of the attorneys asks a question that suggests that it is true. The jury was also instructed that if the court sustained an objection to a question, "the witness will not be permitted to answer. You must ignore the question. If the witness does not answer, do not guess what the answer might have been or why I ruled as I did." In ruling on the objection to the guilt question, the court repeated: "Well, the question is not evidence."

Jurors are presumed to understand and follow the court's instructions. (See *People v. Holt* (1997) 15 Cal.4th 619, 662; *People v. Delgado* (1993) 5 Cal.4th 312, 331.) Appellant has not shown otherwise.

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.